No. 99-1132

JUL 13 2000

In the Supreme Court of the United States

ILLINOIS, PETITIONER

v.

CHARLES MCARTHUR

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether police officers who have probable cause to believe that a residence contains incriminating evidence may temporarily prevent entry in order to preserve the evidence while they seek a search warrant.

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INTEREST OF THE UNITED STATES

This case presents the question whether police officers who have probable cause to believe that a residence contains incriminating evidence may temporarily prevent entry while they seek a search warrant. The United States has a significant law enforcement interest in ensuring that police officers may take that reasonable step in order to preserve the evidence that is the object of the warrant.

STATEMENT

On April 2, 1997, respondent's wife went to the trailer she shared with respondent to remove her property from the residence. At her request, two police officers accompanied her. Pet. App. 2. The officers remained outside the trailer while she removed her belongings. J.A. 25-26. Afterwards, she told the

officers that respondent had marijuana hidden under the couch. An officer then knocked on the door and, when respondent answered, informed him of his wife's accusation and asked for permission to search the trailer. Respondent denied that he had drugs in the trailer but refused to consent to a search. Pet. App. 2.

Within earshot of respondent, who had come out on the porch in front of the trailer, one of the officers asked respondent's wife if she would accompany the other officer to a magistrate to obtain a search warrant. J.A. 26; Pet. App. 2. She agreed and departed with one of the officers. The other officer told respondent what was happening. From that time until the officers obtained the warrant, they did not allow respondent to enter the trailer unless he agreed to be accompanied by an officer. Respondent, so accompanied, entered the trailer two or three times to obtain cigarettes and to make telephone calls. At those times, the officer stood just inside the doorway. Pet. App. 2-3. Following one of the phone calls, respondent's mother arrived at the residence. She too was told that she was not permitted to enter unless accompanied by an officer. J.A. 17-18.

While the police officers awaited the arrival of the warrant, no officer told respondent that he was under arrest, threatened or restrained him, placed him in handcuffs, or told him he was not free to leave. Pet. App. 3. In less than two hours, an officer returned with the warrant, at which time the officers entered the trailer, located the marijuana and drug paraphernalia, and placed respondent under arrest. *Ibid.*; J.A. 27.

Respondent was charged with possession of cannabis and drug paraphernalia, in violation of Illinois law. He filed a pretrial motion to suppress the evidence on the ground that the police officers had violated the Fourth Amendment by preventing him from entering his

trailer while they obtained the search warrant. Pet. App. 1-2. He did not contest the validity of the warrant or that the officers had probable cause to believe the residence contained marijuana and to secure the residence. *Id.* at 4. At the suppression hearing, respondent testified that he would have destroyed the marijuana if he had been permitted to enter the trailer alone. J.A. 27.

The trial court granted respondent's motion to suppress, and the Appellate Court of Illinois affirmed. Pet. App. 1-14. The appellate court noted that, in *Segura* v. *United States*, 468 U.S. 796 (1984), "the Court seemed to agree that the seizure of a residence and its contents is permissible absent exigent circumstances if there is probable cause, but that entry into the residence when securing it requires probable cause and exigent circumstances." Pet. App. 8. The appellate court opined, however, that *Segura* did not address whether police officers, while securing a dwelling, may "limit the freedom of movement of persons within, into or out of the secured premises." *Ibid.* (quoting 3 Wayne R. LaFave, *Search and Seizure* § 6.5(c) at 366 (3d ed. 1996)) (internal quotation marks omitted). The court also noted that *Segura* did not address cases in which "police enter and incident to the entry either keep persons entitled to be in the premises under close scrutiny or else require such persons to leave or not enter those premises." *Ibid.* (quoting 3 LaFave, *supra*, § 6.5(c) at 365).

The court concluded that "[t]his case represents a situation that *Segura* did not address" and that "there was no authority for the police action in this case." Pet. App. 12. The court recognized that "there is no evidence the police affirmatively ordered [respondent] out of the trailer." *Id.* at 11-12. The court nonetheless held that "the police conduct amounted to a constructive

eviction of [respondent] from his residence" because respondent was on "the front porch when police told him he had to remain outside the trailer" and he was thus "still on his premises." *Id.* at 12. The court further concluded that the police officers "secured the dwelling from the inside" because an officer accompanied respondent when he went inside to obtain cigarettes and to make phone calls. *Ibid.* That entry, the court held, was illegal because, in the court's view, it was not justified by exigent circumstances. The court concluded that "the police conduct in securing [respondent's] residence while awaiting the search warrant was an unreasonable seizure (and probably an unreasonable search) under the fourth amendment so that the evidence discovered in the residence upon execution of the search warrant was properly suppressed." *Id.* at 13.[1] The Supreme Court of Illinois denied petitioner leave to appeal. *Id.* at 15.

SUMMARY OF ARGUMENT

Although the police officers seized respondent's trailer when they temporarily prevented his entry, that seizure was reasonable under the Fourth Amendment. To determine the reasonableness of a seizure, the Court balances the government's law enforcement interests against the intrusion on Fourth Amendment interests. That analysis indicates that police officers who have probable cause to believe that a residence contains

[1] The court speculated that the police officers may also have unlawfully seized respondent, but it did not decide that issue. Pet. App. 13-14. The court did not address petitioner's argument (Illinois Br. 18, 35-37) that, even if securing respondent's residence was unlawful, the contraband discovered later during the search pursuant to a valid, untainted warrant was admissible because it had an independent source.

evidence may temporarily prevent entry in order to preserve the evidence while they seek a warrant.

The Court has repeatedly recognized that there is a strong law enforcement interest in preventing tampering with evidence. On the other side of the balance, the intrusion caused by a seizure, which invades only possessory and not privacy interests, is limited. Moreover, the seizure here—a bar on entry pending issuance of a warrant—is temporary and restricts only immediate use of the property.

The Court's precedents confirm that the interest in preserving evidence can temporarily supercede an individual's possessory interest in property when there is probable cause to believe that the property contains incriminating evidence. Police officers may make such warrantless seizures of evidence in plain view; they may also seize containers and vehicles based on probable cause to believe that they are associated with criminal activity. See *Horton* v. *California*, 496 U.S. 128, 136-137 (1990); *United States* v. *Place*, 462 U.S. 696, 701-702 (1983); *Arkansas* v. *Sanders*, 442 U.S. 753, 761 (1979); *Carroll* v. *United States*, 267 U.S. 132, 153 (1925). In dicta, the Court has approved the conduct at issue here—securing premises from the outside to prevent destruction of evidence within. See, *e.g.*, *Segura* v. *United States*, 468 U.S. 796 (1984). Because securing a dwelling from the outside by preventing entry does not invade the physical integrity of the residence or the privacy of the occupants, the rule that a warrant or a valid exception is required when police officers enter or search a home is not implicated. Cf. *Payton* v. *New York*, 445 U.S. 573 (1980).

Although the police officers had particularized suspicion that respondent would destroy evidence if he was allowed to enter his trailer unaccompanied, the Fourth

Amendment does not require such individualized suspicion before officers may secure a residence from the outside while seeking a warrant. The inherent risk of tampering with evidence justifies that limited interference with the owner's use of his property. Requiring individualized suspicion would impose unwarranted impediments to law enforcement and generate unnecessary litigation.

The Appellate Court of Illinois erred in concluding that the police officers constructively evicted respondent and entered his trailer without his consent or a warrant. Respondent was on his front porch when the officers prevented his entry into the trailer, and that location, which is exposed to and used by the visiting public, is not protected by the Fourth Amendment from government intrusion. See *United States* v. *Santana*, 427 U.S. 38, 42 (1976). An officer entered the trailer without a warrant only to accompany respondent when he made phone calls and obtained cigarettes. Respondent, who had lawfully been instructed that he could only enter if he agreed to be accompanied, consented to those entries.

ARGUMENT

POLICE OFFICERS WHO HAVE PROBABLE CAUSE TO BELIEVE THAT A RESIDENCE CONTAINS INCRIMINATING EVIDENCE MAY TEMPORARILY PREVENT ENTRY IN ORDER TO PRESERVE THE EVIDENCE WHILE THEY SEEK A WARRANT

In *Segura* v. *United States*, 468 U.S. 796 (1984), the Court held that the Fourth Amendment's exclusionary rule did not require the suppression of evidence seized from a residence pursuant to a valid search warrant even though federal agents had earlier entered illegally and then remained inside to prevent destruction of

evidence. *Id.* at 799, 813-816. Five Justices agreed that the exclusionary rule did not apply. *Ibid.* Two Justices also addressed whether the agents' securing of the premises complied with the Fourth Amendment. *Id.* at 805-813 (Burger, C.J., joined by O'Connor, J.). Chief Justice Burger and Justice O'Connor concluded that, when police officers have probable cause to believe that a residence contains evidence of criminal activity, they may temporarily secure the dwelling to prevent removal or destruction of evidence. *Ibid.*

This case poses a question similar to the one addressed by Chief Justice Burger and Justice O'Connor in *Segura*: whether police officers may, while they seek a search warrant, secure a residence (in this case, from the outside) when they have probable cause to believe that it contains incriminating evidence. As the Appellate Court of Illinois recognized, "[a]t the heart of this issue is the preservation of evidence. Clearly, if police secure a dwelling they prohibit the destruction of the sought-after evidence. On the other hand, if police do not secure a dwelling, they risk losing the evidence." Pet. App. 11. Contrary to the conclusion of the appellate court, however, the Fourth Amendment does not prevent police officers from guarding against that risk. Police officers who have probable cause to believe that a residence contains incriminating evidence may temporarily prevent entry in order to preserve the status quo while they seek a warrant.[2]

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[2] Respondent has contested neither the existence of probable cause to believe that his trailer contained marijuana nor the validity of the search warrant obtained by the police officers. Pet. App. 4. This case therefore does not present the question whether a temporary prohibition on entry into a residence requires suppression when police officers reasonably believe that they have probable cause but a magistrate or a reviewing court ultimately

A. By Preventing Entry Into Respondent's Trailer, The Police Officers Seized The Trailer But Did Not Seize Respondent

"From the time of the founding to the present, the word 'seizure' has meant a 'taking possession.'" *California* v. *Hodari D.*, 499 U.S. 621, 624 (1991) (quoting 2 Noah Webster, *An American Dictionary of the English Language* 67 (1828); 2 John Bouvier, *A Law Dictionary* 510 (6th ed. 1856); *Webster's Third New International Dictionary* 2057 (1981)). A seizure of property thus occurs "when there is some meaningful interference with an individual's possessory interests in that property." *United States* v. *Jacobsen*, 466 U.S. 109, 113 (1984). Therefore, the police officers "seized" respondent's trailer when they interfered with his possessory interests by temporarily preventing his unaccompanied entry.[3]

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determines that their belief was mistaken. Cf. *United States* v. *Leon*, 468 U.S. 897, 926 (1984). Nor does the case present the question whether preventing entry may be justified in some circumstances when police officers have only reasonable suspicion that the premises contain incriminating evidence. Cf. *United States* v. *Place*, 462 U.S. 696, 702 (1983). Finally, as we explain at pp. 24-26, *infra*, this case does not present the question whether police officers can either enter the premises or order the occupants to leave in order to secure the premises. See generally 3 Wayne R. LaFave, *Search and Seizure* § 6.5(c) at 361-373 (3d ed. 1996 & Supp. 1999).

[3] The seizure of the trailer was not, however, also a seizure of the contraband that the officers discovered only when they later searched the trailer pursuant to a warrant. Police officers seize a tangible, movable object only when they take it under their physical control. See *Hodari D.*, 499 U.S. at 624 ("For most purposes at common law, ["seizure"] connoted not merely grasping, or applying physical force to, the animate or inanimate object in question, but actually bringing it within physical control."); 1 LaFave, *supra*, § 2.1, at 375-376 (3d ed. 1996) (defining seizure as the "act of physically taking and removing tangible personal property"). Police officers therefore do not seize evidence until they actually discover it and assert control over it, even if they have secured the premises where the evidence is located. For that reason, the Court has given detailed consideration to the circumstances in which police officers may seize evidence found in plain view while executing a warrant, even though the area being searched is already under their custody and control. See, *e.g.*, *Horton* v. *California*, 496 U.S. 128 (1990). And the Court has characterized the taking of individual items from an automobile as a seizure even when police officers had previously seized the automobile. See, *e.g.*, *Colorado* v. *Bannister*, 449 U.S. 1, 3-4 (1980); *Harris* v. *United States*, 390 U.S. 234, 236 (1968).

Although the officers seized respondent's residence by securing it and preventing unaccompanied entries, they did not seize respondent. A seizure of a person occurs only when "a reasonable person would believe that he or she is not 'free to leave.'" *Florida* v. *Bostick*, 501 U.S. 429, 435 (1991); see also *Hodari D.*, 499 U.S. at 627-628. Circumstances that "might indicate a seizure * * * [include] the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.).

The only restriction on respondent's movements was that he was not allowed to enter his trailer (unless accompanied by an officer) for less than two hours while the police obtained a search warrant. He was not threatened or physically restrained; he was not handcuffed; he was not told that he was under arrest or given *Miranda* warnings. J.A. 29-30; Pet. App. 14. Under those circumstances, a reasonable person would

not have believed that he was unable to go anywhere else he desired. Indeed, respondent agreed that the officers never indicated that he was not free to leave. J.A. 29. Thus, he was not seized within the meaning of the Fourth Amendment.

A contrary conclusion could cast doubt on the validity of well-established law enforcement practices that are commonly recognized as constitutional. Police officers often must cordon off an area during an investigation, for example, to apprehend a fugitive or to investigate a bomb threat. When they do so, they do not thereby seize the persons whom they prevent from entering the area. Cf. *Chicago* v. *Morales*, 527 U.S. 41, 69 (1999) (Kennedy, J., concurring in part and concurring in the judgment) (discussing with approval situations in which "the police tell a pedestrian not to enter a building and the reason is to avoid impeding a rescue team, or to protect a crime scene, or to secure an area for the protection of a public official").[4]

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[4] In any event, seizure of respondent would have been justified because police officers had probable cause to believe he had committed a crime based on his wife's statement that he had marijuana hidden under his couch. See J.A. 15, 19; 720 Ill. Comp. Stat. 550/4 (West 1993 & Supp. 2000) (criminalizing possession of marijuana); *id.* 600/3.5 (West 2000) (criminalizing possession of drug paraphernalia). This case does not present the question whether, absent probable cause, seizure of respondent would have been justified as incident to the temporary seizure of his trailer pending issuance of a warrant. Cf. *Michigan* v. *Summers*, 452 U.S. 692, 705 (1981) ("a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted") (footnote omitted); *id.* at 702 n.17 (suggesting that the Court would reach the same result with regard to a lawful search without a warrant).

B. The Temporary Seizure Of Respondent's Trailer Was Reasonable Because The Officers Had Probable Cause To Believe That It Contained Incriminating Evidence

1. The essential requirement of the Fourth Amendment is that searches and seizures be reasonable. See *Maryland* v. *Wilson*, 519 U.S. 408, 411 (1997). To determine the reasonableness of a search or seizure, the Court balances the government's law enforcement interests against the intrusion on Fourth Amendment interests. *Ibid.* Application of that analysis here indicates that the police officers acted reasonably in temporarily preventing entry into respondent's trailer, which they had probable cause to believe contained incriminating evidence, in order to preserve that evidence while they sought a warrant.[5]

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[5] Even if the seizure of respondent's residence had been unlawful, the Illinois courts should not have excluded the evidence, which was seized in a lawful search pursuant to a valid, untainted warrant. The warrant, the validity of which respondent does not contest, Pet. App. 4, was supported by information that the officers obtained from respondent's wife before any interference with respondent's Fourth Amendment interests. As we noted at pp. 6-7, *supra*, the Court held in *Segura* that evidence obtained pursuant to such a warrant is admissible based on the "independent source" rule regardless of whether unlawful police action preserved the evidence. See 468 U.S. at 813-816; see generally *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392 (1920). That holding applies here. The only sense in which the seized evidence could be viewed as "in some sense the product of illegal governmental activity," *United States* v. *Crews*, 445 U.S. 463, 471 (1980), is because respondent would have illegally destroyed the evidence if the officers had not prevented his entry into the trailer. See J.A. 27; 720 Ill. Comp. Stat. 5/31-4(a) (West 1993 & Supp. 2000) (criminalizing destruction of evidence to prevent apprehension). The Court rejected that reasoning in *Segura*, explaining that there is no "'constitutional right' to destroy evidence." 468 U.S. at 816. As we explained at note 1, *supra*, the appellate court did not

a. Law enforcement has a strong interest in preventing tampering with evidence pending the issuance and execution of a warrant to search for and seize that evidence. "Unless there is some kind of a power to prevent removal of material from the premises, or destruction of material during this time, the search warrant will almost inevitably be fruitless." *Segura*, 468 U.S. at 809 n.7 (Burger, C.J., joined by O'Connor, J.) (quoting Erwin Griswold, *Criminal Procedure, 1969 —Is It a Means or an End?*, 29 Md. L. Rev. 307, 317 (1969)). That interest is particularly pronounced in the case of evidence that is capable of ready destruction, such as narcotics. See *Richards* v. *Wisconsin*, 520 U.S. 385, 391 (1997) (drug investigations frequently present the risk that evidence will be destroyed if occupants have advance notice of a search); *Michigan* v. *Summers*, 452 U.S. 692, 702 (1981) (search for narcotics likely to trigger "frantic efforts to conceal or destroy evidence"); *Ker* v. *California*, 374 U.S. 23, 28 n.3 (1963) (likely that suspects will attempt to dispose of drugs before police seize them). Indeed, respondent acknowledged that he would have destroyed the marijuana if he had been allowed to reenter his trailer unaccompanied by an officer. J.A. 27.

This Court has recognized the importance of the interest in preventing tampering with evidence in a variety of contexts. A limited search incident to an arrest is permitted in part because of the danger of destruction of evidence, even when police officers have

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address the independent-source issue in its opinion in this case, although petitioner raised the issue. In their briefs before the appellate court, the parties disputed whether petitioner had properly preserved the issue. See Defendant-Appellee Br. 3; Illinois Reply Br. 12-16.

no individualized suspicion that the person arrested is concealing evidence or intends to destroy it. See *Chimel* v. *California*, 395 U.S. 752, 763 (1969). The risk of losing evidence likewise supports the rules that incriminating evidence found in plain view, and containers and vehicles linked with criminal activity, may be seized without a warrant. See *United States* v. *Place*, 462 U.S. 696, 701-702 (1983); *Arkansas* v. *Sanders*, 442 U.S. 753, 761 (1979); *Carroll* v. *United States*, 267 U.S. 132, 153 (1925). The danger that evidence may be lost also underlies the authority of firefighting officials to remain in a building for a reasonable time and search it after extinguishing a fire. *Michigan* v. *Tyler*, 436 U.S. 499, 510 (1978). Indeed, when police officers have individualized suspicion that evidence will be destroyed, they may make intrusions as significant as entering a dwelling without knocking and announcing their presence or obtaining a warrant. See, *e.g.*, *Richards*, 520 U.S. at 395; *United States* v. *Santana*, 427 U.S. 38, 43 (1976); *United States* v. *Jeffers*, 342 U.S. 48, 51-52 (1951).

b. The intrusion on Fourth Amendment interests at issue here—temporarily preventing entry into a residence while police officers seek a warrant—is limited. Unlike a search, which invades privacy interests, a seizure affects only possessory interests. See *Horton* v. *California*, 496 U.S. 128, 133 (1990); *Soldal* v. *Cook County*, 506 U.S. 56, 62-63 (1992); *Jacobsen*, 466 U.S. at 113 & n.5, 122, 126 (1983); *United States* v. *Chadwick*, 433 U.S. 1, 13-14 & n.8 (1977). Seizures of property, such as the prohibition on entry here, are thus generally less intrusive than searches, because privacy is the "principal object" protected by the Fourth Amendment, *Warden* v. *Hayden*, 387 U.S. 294, 304 (1967). See *Segura*, 468 U.S. at 806 (Burger, C.J., joined by

O'Connor, J.); *Chadwick*, 433 U.S. at 13-14 n.8. See also *Jones* v. *United States*, 357 U.S. 493, 498 (1958) ("The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted invasions into his privacy."). Cf. *Soldal*, 506 U.S. at 62-66 (rejecting contention that seizures involving no intrusion on privacy or personal liberty are immune from scrutiny under the Fourth Amendment).

The intrusion on respondent's Fourth Amendment interests was particularly limited because the police officers prohibited entry into his trailer only temporarily (for less than two hours while they obtained a search warrant) and because they did not infringe his other possessory interests—such as the right to sell or to encumber the property. See J.A. 27. This Court has repeatedly recognized that temporary seizures are less intrusive than permanent ones. See, *e.g.*, *Place*, 462 U.S. at 705-706, 709; *Summers*, 452 U.S. at 701, 705 n.21; *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 880 (1975); *Adams* v. *Williams*, 407 U.S. 143, 146 (1972); *United States* v. *Van Leeuwen*, 397 U.S. 249, 252-253 (1970).

Moreover, the intrusiveness of a seizure to preserve evidence while police officers seek a warrant is further reduced because there should be a prompt judicial determination whether there is probable cause to search the house and seize evidence within it. See *Place*, 462 U.S. at 709; *Summers*, 452 U.S. at 701 n.14 (quoting with approval 3 Wayne R. LaFave, *Search and Seizure* § 9.2, at 40 (1978) (reasonableness of a detention may be determined in part by "whether the police are diligently pursuing a means of investigation which is likely to resolve the matter one way or another very soon")); *California* v. *Acevedo*, 500 U.S. 565, 575

(1991) ("we can assume that a warrant will be routinely forthcoming in the overwhelming majority of cases").[6]

2. The Court's precedents confirm that "society's interest in the discovery and protection of incriminating evidence from removal or destruction can supersede, at least for a limited period, a person's possessory interest in property, provided that there is probable cause to believe that that property is associated with criminal activity." *Segura*, 468 U.S. at 808 (Burger, C.J., joined by O'Connor, J.). For example, as we discussed above, if police officers have probable cause to believe that a container holds evidence, they may seize the container while they secure a warrant. See, *e.g.*, *Acevedo*, 500 U.S. at 575; *Sanders*, 442 U.S. at 761. Indeed, they may seize it pending investigation based upon reasonable suspicion. See *Place*, 462 U.S. at 706. Further, when police officers are lawfully present in a particular place, they may seize evidence in plain view provided they have probable cause to believe that it is associated with criminal activity. See, *e.g.*, *Horton*, 496 U.S. at 136-137; *Place*, 462 U.S. at 701-702. These precedents reflect the principle that, because of the general risk of tampering with or loss of evidence, police officers may take reasonable measures to preserve the status quo pending issuance of a search warrant.

That principle also applies when, as in this case, police officers have probable cause to believe that evidence is contained in a dwelling. They may secure the dwelling to preserve the evidence by preventing entry for a reasonable period while they seek a warrant to search for and seize the evidence.

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[6] The intrusion on respondent's Fourth Amendment interests was even more limited because the police allowed him to enter his trailer accompanied by an officer. J.A. 22, 27-28, 30.

a. Absent consent or exigent circumstances, a warrant is generally necessary to enter a dwelling whether to make an arrest or to search for and seize evidence that may be inside. See *Payton* v. *New York*, 445 U.S. 573, 586-590 (1980); *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 354 (1977). "But the home is sacred in Fourth Amendment terms not primarily because of the occupants' *possessory* interests in the premises, but because of their *privacy* interests in the activities that take place within." *Segura*, 468 U.S. at 810 (Burger, C.J., joined by O'Connor, J.).

As the Court made clear in *Payton*, "the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." 445 U.S. at 585. Entry into a dwelling invades the privacy interests that lie at the heart of the Fourth Amendment. See *id.* at 587-588 & n.26; *Jones*, 357 U.S. at 498. Therefore, "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances [or consent], that threshold may not reasonably be crossed without a warrant." 445 U.S. at 590. See also *New York* v. *Harris*, 495 U.S. 14, 17 (1990) (explaining that "the rule in *Payton* was designed to protect the *physical integrity* of the home") (emphasis added).

When police officers temporarily secure a dwelling from the outside, as they did here, they do not make an entry or otherwise invade the occupant's privacy interests in the home. The considerations that justify the warrant requirement are therefore absent, and the general rule permitting temporary seizures to preserve evidence based on probable cause applies.[7]

[7] Of course, a temporary seizure that would otherwise be lawful may be rendered unlawful by the manner in which it is executed,

b. The Court's opinions reflect the understanding that a temporary seizure of a dwelling to preserve evidence pending issuance of a warrant is reasonable under the Fourth Amendment. For example, in *Jeffers*, 342 U.S. at 52, the Court held that a warrantless *entry* into a hotel room was unconstitutional because there were no exigent circumstances, such as "imminent destruction, removal, or concealment of the property intended to be seized." The Court reasoned that police officers "could have easily prevented any such destruction or removal by merely guarding the door." *Ibid.* Similarly, in *Mincey* v. *Arizona*, 437 U.S. 385, 395 (1978), the Court held unconstitutional a warrantless *search* of an apartment in which a homicide had been committed. The Court noted approvingly, however, the use of a police guard to prevent destruction of evidence. *Id.* at 394. And, in *Flippo* v. *West Virginia*, 120 S. Ct. 7 (1999) (per curiam), the Court reaffirmed that a warrantless search of a dwelling in which a homicide has occurred is not permitted, but did not suggest that police officers acted improperly in "clos[ing] off the area" (*ibid.*) and "secur[ing]" the scene (*id.* at 8). Indeed, in rejecting the contention that the trial court had found the search justified by exigent circum-

including its duration. See *Place*, 462 U.S. at 707-710. And a total, permanent seizure of a dwelling may so significantly intrude on the occupant's possessory interests that even a warrant is not sufficient. See *United States* v. *James Daniel Good Real Property*, 510 U.S. 43 (1993) (due process requires notice and hearing before seizure of real property for forfeiture because such a seizure gives government the right to prohibit sale, to evict occupants, to modify the property, to condition occupancy, and to receive rents). The seizure for the purposes of preserving evidence that occurred here, however, lasted less than two hours and involved only a limited restriction on respondent's right to use his property.

stances, the Court reasoned that "[i]t seems implausible that the court found that there was a risk of intentional or accidental destruction of evidence at a 'secured' crime scene." *Id.* at 8 n.2.

In *Segura*, the Court addressed the securing of a dwelling from the inside. As noted above, in that case, federal agents entered an apartment, arrested the occupants, and then remained on the premises to preserve evidence until they obtained a warrant. 468 U.S. at 800-801. The government conceded that the entry was illegal but argued that the subsequent securing of the premises was lawful and that evidence obtained in a search pursuant to the warrant was admissible. *Id.* at 804. The Court upheld the admissibility of the evidence. See *id.* at 798-799.

Chief Justice Burger, in a portion of the opinion joined by Justice O'Connor, concluded that a temporary warrantless seizure of property is reasonable when police officers have probable cause to believe the property contains evidence of a crime and a seizure will preserve the status quo and the availability of the evidence. See 468 U.S. at 805-813. Applying that conclusion to the securing of premises, the Chief Justice approved of a course of action by which police officers would "secure the premises from the outside by a 'stakeout' once the security check revealed that no one other than those taken into custody w[as] in the apartment." *Id.* at 811. Five Justices joined the remainder of the opinion, which held that, regardless of the legality of the initial entry, the evidence was lawfully seized pursuant to an untainted warrant and should not be suppressed. *Id.* at 813-814. The Court indicated that the agents lawfully could have secured the premises from the outside. See *id.* at 814 ("Had police never entered the apartment, but instead conducted a perimeter stakeout to prevent anyone from entering the apartment and destroying evidence, the contraband now challenged would have been discovered and seized precisely as it was here."). Indeed, even the dissenters apparently agreed that the authorities could have sealed off the premises from the outside without violating the Fourth Amendment. See *id.* at 824 n.15 (dissenting opinion) ("I assume impoundment would be permissible even absent exigent circumstances when it occurs 'from the outside'—when the authorities merely seal off premises pending the issuance of a warrant but do not enter."). Thus, all of the Justices in *Segura* appear to have endorsed the external securing of a dwelling while the police seek a warrant. See 3 LaFave, *supra*, § 6.5(c) at 366.

C. Individualized Suspicion That Evidence Would Be Destroyed Was Not Necessary To Support The Temporary Seizure

In this case, the police officers had reasonable suspicion that respondent would destroy evidence if he was allowed to enter his trailer alone.[8] The Fourth

[8] Respondent's awareness of the police presence outside his residence (J.A. 25-26) was sufficient grounds for a reasonable officer to suspect that respondent would destroy narcotics that he had hidden inside. The reasonableness of that suspicion was strengthened here by several other circumstances: First, respondent knew that police officers were assisting his wife while she moved out (*ibid.*), and respondent might therefore have suspected that she would tell the officers about his drugs in order to get him into trouble (see J.A. 20). Second, after respondent's wife told the officers about the contraband, they confronted him with her accusation and sought his consent to a search. J.A. 16. Finally, after he refused, respondent overheard his wife's conversation with the officers in which she agreed to accompany an officer to seek a search warrant. J.A. 26.

Amendment, however, does not require such individualized suspicion before police officers may prevent entry into a residence while seeking a warrant. The inherent risk that evidence will be destroyed, altered, or concealed is sufficient to justify that limited interference with the owner's use of the property.[9]

1. The cases in which the Court has approved temporary seizures based on probable cause have not involved particularized suspicion that evidence would be destroyed or damaged. As Chief Justice Burger and Justice O'Connor noted in *Segura*, the Court in *Sanders* approved the warrantless seizure of a suitcase from a car even though police officers could have followed the car until a warrant issued in order to ensure that evidence would not be lost. 468 U.S. at 808; see *Sanders*, 442 U.S. at 761. See also *Acevedo*, 500 U.S. at 575 (noting that "[l]aw enforcement officers may seize a container and hold it until they obtain a search warrant" without indicating that there is any requirement of particularized suspicion that the container will be moved or its contents disturbed). Likewise, in *Chambers* v. *Maroney*, 399 U.S. 42 (1970), the Court held that, because police officers had probable cause to search an automobile, they could seize and impound it

[9] As we noted at p. 12, *supra*, that risk is especially prevalent when the evidence for which the officers are seeking a warrant is narcotics or another readily destructible material. Nonetheless, almost all evidence is subject to tampering that may impair its usefulness to police investigators; for example, the serial numbers on stolen merchandise can be removed or obscured even if the merchandise is too large to destroy. The possibility that there may be a few situations in which there is no danger of tampering with evidence does not justify a general requirement of individualized suspicion, which would pose impediments to law enforcement and could consume significant judicial resources, see pp. 22-23, *infra*.

"for whatever period [was] necessary to obtain a warrant for the search" (*id.* at 51), even though "there was no immediate fear that the evidence was in the process of being destroyed or otherwise lost." *Segura*, 468 U.S. at 807 (Burger, C.J., joined by O'Connor, J.).[10]

Similarly, individualized suspicion that the evidence will be destroyed is not required to justify the seizure of evidence in plain view, see *Horton*, 496 U.S. at 136-137, even though the Court has explained that seizure of such evidence without a warrant is reasonable because of the "risk of the item's disappearance." *Place*, 462 U.S. at 701.[11] Nor is a particularized suspicion that a wanted felon will flee necessary to justify a public arrest without a warrant. See *United States* v. *Watson*,

[10] The Court went on to hold that the car could be searched immediately because "there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained." *Chambers*, 399 U.S. at 52. The Court noted that the same reasoning would not necessarily support immediate search of a house based on probable cause alone but explained that "there is a constitutional difference between houses and cars." *Ibid.*; see also *Chadwick*, 433 U.S. at 12-13 (noting lesser expectation of privacy in automobiles).

[11] Our rule is thus consistent with the Court's statement in *Place* that temporary seizures do not require a warrant "if the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present." 462 U.S. at 701. Because there is generally a risk that evidence will be destroyed or tampered with while police officers are seeking a warrant, "the exigencies of the circumstances demand" (*ibid.*) that a seizure based on probable cause be permitted, at least where, as here, the seizure involves no concomitant invasion of privacy. Thus, the Court in *Place* identified the seizure of weapons or contraband in plain view as an example of when the exigencies of the circumstances justify seizure without a warrant even though the Court has not required individualized suspicion that evidence in plain view will be destroyed to support its warrantless seizure.

423 U.S. 411, 423-424 (1976). Rather, "it is recognized that in any felony case the person to be arrested may attempt to flee." *Chimel*, 395 U.S. at 780 (White, J., dissenting, joined by Black, J.) (quoting S. Rep. No. 2464, 81st Cong., 2d Sess. 2 (1950)).

Most to the point, the Court has signaled its approval of the external securing of a dwelling in cases in which there was no particularized reason to believe that evidence would be damaged or destroyed. For example, in *Mincey*, in which the Court approved stationing the guard at the entrance to the apartment, "[t]here was no indication that evidence would be lost, destroyed, or removed during the time required to obtain a search warrant." 437 U.S. at 394. See also *Flippo*, 120 S. Ct. at 8 n.2; *Jeffers*, 342 U.S. at 52. And, in *Segura*, "[a]ll members of the Court appear[ed] to agree that the mere seizure of the premises and contents (that is, a mere interference with possessory interests) is permissible on probable cause *even absent exigent circumstances*." 3 LaFave, *supra*, § 6.5(c) at 366 (emphasis added).

2. Law enforcement would be impeded if police officers were required to develop particularized suspicion that each person whose entry they sought to prevent was likely to tamper with evidence. If there were such a requirement, an officer could not prevent someone's entry into a residence even if the officer had probable cause to believe that the residence contained evidence of a crime, unless he also had specific reason to suspect that the particular person was implicated in the illegal conduct.

Yet entry by an individual whom the evidence does not incriminate may pose a significant (if unknown) risk that evidence will be removed or destroyed. Although such an individual may not have a direct interest in

tampering with the evidence, he may nonetheless be willing to destroy evidence to assist others whom the evidence does incriminate, or even to avoid suspicion being cast on him. His willingness to do so will depend on a wide array of facts that will be difficult for police officers to ascertain, including whether he knows that the evidence exists, whether he knows that the officers are planning to seize it, whether he knows that the evidence is incriminating, whether he knows whom it incriminates, his relationship to the individuals whom it incriminates, and his willingness to obstruct justice in order to aid those individuals.

In this case, for example, respondent's mother arrived at the trailer after a phone conversation with respondent. J.A. 17-18. The police officers could not know whether she was involved in, or even aware of, her son's possession of marijuana. Further, they could not be sure whether respondent had informed her of the events unfolding at the trailer. And the officers could not know whether she was willing to destroy the evidence to protect her son.

A requirement of individualized suspicion not only would impede law enforcement but also would consume judicial resources with litigation over the reasonableness of police judgments in particular cases. The Court has relied on the prospect of such litigation in declining to require an inquiry into individualized suspicion in other Fourth Amendment contexts. See, *e.g.*, *Wyoming* v. *Houghton*, 526 U.S. 295, 305 (1999); *Watson*, 423 U.S. at 423-424. That consideration also supports rejection of a case-by-case inquiry into the danger of evidence tampering here.

D. This Case Involves Neither A Constructive Eviction Nor A Search Without A Warrant Or Consent

The Appellate Court of Illinois held that the police officers violated the Fourth Amendment in this case for two reasons: First, the court concluded that the officers "contructive[ly] evict[ed] [respondent] from his residence" because he was on his front porch when they told him he could not enter his trailer alone while they sought a warrant. Pet. App. 12. Second, the court concluded that the officers conducted an unjustified, warrantless search when an officer accompanied respondent into the trailer while he made telephone calls and obtained cigarettes. *Id.* at 12-13. Both conclusions are incorrect.

1. The appellate court found no evidence that the officers ordered respondent to leave his trailer. Pet. App. 11-12. Nonetheless, because respondent was on the front porch and thus "still on his premises" when the officers prevented his reentry into the trailer, the court determined that the police conduct amounted to a "constructive eviction" of respondent. *Id.* at 12.

That determination was mistaken. "What a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment protection." *Katz* v. *United States*, 389 U.S. 347, 351 (1967). Although, as a matter of property law, respondent's front porch, like the threshold of his trailer and the yard surrounding it, is private, "it is nonetheless clear that under the cases interpreting the Fourth Amendment [respondent] was in a 'public' place." See *Santana*, 427 U.S. at 42. See also 1 LaFave, *supra*, § 2.3(f) at 506-507 ("places visitors could be expected to go (e.g., walkways, driveways, porches)" are not curtilage protected by the Fourth Amendment from intrusion)

(footnotes omitted). Just as the officers in *Santana* did not invade any privacy interest when they sought to arrest the defendant as she stood on her threshold, the officers here did not invade respondent's privacy interests or "constructive[ly] evict[]" him "from his residence" (Pet. App. 12) when they prevented his entry into the trailer from his front porch.

2. The appellate court also erred in concluding that the police officers "secured the dwelling from the inside" and "probably" conducted "an unreasonable search" (Pet. App. 12-13) when an officer accompanied respondent into the trailer while he made telephone calls and obtained cigarettes. The Fourth Amendment's prohibition against warrantless searches does not apply when voluntary consent has been obtained. See *Illinois* v. *Rodriguez*, 497 U.S. 177, 181 (1990). In this case, respondent consented to the officer's entry.

As we have explained, the police officers could constitutionally have denied respondent all access to the trailer, in order to preserve evidence while they obtained a warrant. See pp. 11-19, *supra*. Therefore, the officers could constitutionally condition respondent's access to the trailer on his agreement that an officer could accompany him, because the officer's presence was a reasonable means to neutralize the risk that respondent would destroy evidence if he entered. Cf. *Dolan* v. *City of Tigard*, 512 U.S. 374, 385, 391 (1994) (the government may condition a benefit on the relinquishment of a constitutional right if the waiver of the right is reasonably related to the benefit).

The police officers advised respondent that he could enter the trailer only if he was accompanied by an officer. J.A. 22, 27, 30. By choosing to enter under that reasonable condition, respondent consented to the

officer's entry.[12] Cf. *United States* v. *Rosi*, 27 F.3d 409, 412 (9th Cir. 1994) (by asking the FBI agents who had arrested him for permission to change his clothes and providing them with a key to his condominium, the defendant consented to their accompanying him inside the residence).

CONCLUSION

The judgment of the Appellate Court of Illinois should be reversed.

Respectfully submitted.

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[12] When the officer entered the trailer on those occasions, he "just stepp[ed] right inside the door and just stood by the doorway." J.A. 18. He did not "conduct any search while he was in there" (J.A. 30) and therefore did not discover any of the evidence that the police officers found when they later searched the trailer pursuant to the warrant. Thus, even if respondent had not consented to the entry, the Illinois courts should not have excluded the evidence based on that entry, because it was not "the product of illegal governmental activity." *Harris*, 495 U.S. at 19 (quoting *Crews*, 445 U.S. at 471).